NO. 89-1117 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRST NATIONAL BANK OF BELLAIRE,
Petitioner

v.

HUFFMAN INDEPENDENT SCHOOL DISTRICT AND STATE OF TEXAS - COUNTY OF HARRIS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

RESPONDENT, HUFFMAN INDEPENDENT SCHOOL DISTRICT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment mandates that a lienholder be afforded the same rights as a property owner to receive notice of and an opportunity to contest the appraisal, assessment, and exempt or non-exempt status of the property owner's property, without the permission of the property owner.

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To The Supreme Court of the United States:

The Respondent, Huffman Independent School District ("Huffman"), respectfully requests that the Court deny the petition for writ of certiorari seeking review of the opinion rendered by the Court of Appeals for the Four-

teenth Supreme Judicial District of Texas ("Fourteenth Court of Appeals"). That opinion is reported at 770 S.W.2d 571 (Tex. App.—Houston [14th Dist.] 1989, writ denied), and is reprinted in the appendix to the petition for writ of certiorari ("petition") at page 1a.

LACK OF JURISDICTION

On January 16, 1990, Petitioner, FIRST NATIONAL BANK OF BELLAIRE ("BELLAIRE"), voluntarily paid TWENTY NINE THOUSAND ONE HUNDRED ONE AND 97/100 DOLLARS ($29,101.97) to Respondent, HUFFMAN, in full and final payment of all delinquent ad valorem taxes, including penalties and interest, owed to HUFFMAN.[1] Since full payment was made, the issues raised by BELLAIRE against HUFFMAN are moot. Accordingly, the Court does not have jurisdiction to hear this case.

Texas has long followed the voluntary payment rule, that is, a tax voluntarily paid cannot be recovered, even if illegally imposed or collected pursuant to an allegedly unconstitutional tax statute.[2] *See Texas Nat'l Bank of Baytown v. Harris County,* 765 S.W.2d 823 (Tex. App. —Houston [14th Dist.] 1988, writ denied). The "voluntary payment" rule applies to cases challenging tax payments made pursuant to V.T.C.A., Tax Code §§ 1.01 *et seq.* (Vernon 1982 and Supp. 1990) ("Tax Code"), the very Tax Code at issue in this case. *See Id.; First*

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1. Attached as Appendix A is the tax receipt evidencing BELLAIRE's voluntary payment of the very taxes BELLAIRE claims it should not have to pay.

2. Although there are certain exceptions to the voluntary payment rule, none are applicable herein.

Bank of Deer Park v. Deer Park Ind. School Dist., 720 S.W.2d 849 (Tex. App.—Texarkana 1989, no writ); *Hunt County Tax Appraisal Dist. v. Rubbermaid, Inc.*, 719 S.W.2d 215 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Salvaggio v. Houston Ind. School Dist.*, 709 S.W. 2d 306 (Tex. App.—Houston [14th Dist.] 1986, writ dism'd).

Once taxes are voluntarily paid, *all* questions regarding their validity are moot.[3] *Texas Nat'l Bank of Baytown, supra.* It is axiomatic that the jurisdiction of this Court cannot be invoked to adjudicate a moot claim. As recognized by this Court in *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO, et al v. Missouri,* 361 U.S. 363, 367-68 (1960):

> [T]he duty of this Court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." [citations omitted] To express an opinion upon the merits of the appellants' contentions would be to ignore the basic limitation upon the duty and function of the Court, and to disregard principles of judicial administration long established and repeatedly followed.

The same is true in this case. Accordingly, the Court should deny the petition.

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3. BELLAIRE is well aware of this law. Two of BELLAIRE's affiliates, First Bank of Deer Park and Texas Nat'l Bank of Baytown, through similar counsel, Royston, Rayzor, Vickery & Williams, were involved in cases where the Texas Courts recognized the validity of the "voluntary payment" rule. *See Texas Nat'l Bank of Baytown v. Harris County, supra;* and *First Bank of Deer Park v. Deer Park Ind. School Dist., supra.*

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following sections are added to the constitutional and statutory provisions set forth in the petition:

Section 1.07 of the Tax Code provides:

> *Delivery of Notice.* (a) An official or agency required by this title to deliver a notice to a property owner may deliver the notice by regular first class mail, with postage prepaid, unless this title requires a different method of delivery.
>
> (b) The official or agency shall address the notice to the property owner or, if appropriate, his agent at his address according to the most recent record in the possession of the official or agency. However, if a property owner files a written request that notices be sent to a particular address, the official or agency shall send the notice to the address stated in the request.
>
> (c) A notice permitted to be delivered by first-class mail by this section is presumed delivered when it is deposited in the mail. This presumption is rebuttable when evidence of failure to receive notice is provided.

Section 1.11 of the Tax Code provides:

> *Communication to Fiduciary.* (a) On the written request of a property owner, an appraisal office or an assessor or collector shall deliver all notices, tax bills, and other communications relating to the owner's property or taxes to the owner's fiduciary.
>
> (b) A request pursuant to this section remains in effect until revoked by the owner.

Section 6.01 of the Tax Code provides:

> *Appraisal District Established.* (a) An appraisal district is established in each county.

(b) The district is responsible for appraising property in the district for ad valorem tax purposes of each taxing unit that imposes ad valorem taxes on property in the district.

(c) An appraisal district is a political subdivision of the state.

Section 11.01 of the Tax Code provides in relevant part:

(a) All real and tangible personal property that this state has jurisdiction to tax is taxable unless exempt by law.

Section 22.01 of the Tax Code provides:

Rendition Generally. (a) Except as provided by Chapter 24 of this code, a person shall render for taxation all tangible personal property used for the production of income that he owns or that he manages and controls as a fiduciary on January 1.

(b) When required by the chief appraiser, a person shall render for taxation any other taxable property that he owns or that he manages and controls as a fiduciary on January 1.

(c) A person may render for taxation any property that he owns or that he manages and controls as a fiduciary on January 1, although he is not required to render it by Subsection (a) or (b) of this section.

(d) A fiduciary who renders property shall indicate his fiduciary capacity and shall state the name and address of the owner.

Section 23.01 of the Tax Code provides:

Appraisals Generally. (a) Except as otherwise provided by this chapter, all taxable property is appraised at its market value as of January 1.

(b) The market value of property shall be determined by the application of generally accepted appraisal techniques, and the same or similar appraisal techniques shall be used in appraising the same or similar kinds of property. However, each property shall be appraised based upon the individual characteristics that affect the property's market value.

Section 23.43 of the Tax Code provides in relevant part:

Application. (a) An individual claiming the right to have his land designated for agricultural use must apply for the designation each year he claims it. Application for the designation is made by filing a sworn application form with the chief appraiser for the appraisal district in which the land is located.

(b) A claimant must deliver a completed application form to the chief appraiser before May 1 and must furnish the information required by the form. For good cause shown the chief appraiser may extend the deadline for filing the application by written order for a single period not to exceed 60 days.

(c) If a claimant fails to timely file a completed application form in a given year, he may not receive the agricultural designation for that year.

Section 23.73 of the Tax Code provides in relevant part:

Appraisal of Qualified Timber Land. (a) The appraised value of qualified timber land is determined on the basis of the category of the land, using accepted income capitalization methods applied to average net to land. The appraised value so determined may not exceed the market value of the land as determined by other appraisal methods.

Section 32.04 of the Tax Code provides:

Priorities Among Tax Liens. (a) Whether or not a tax lien provided by this chapter takes priority over

a tax lien of the United States is determined by federal law. In the absence of federal law, a tax lien provided by this chapter takes priority over a tax lien of the United States.

(b) Tax liens provided by this chapter have equal priority.

Section 32.07 of the Tax Code provides:

Personal Liability For Tax. (a) Except as provided by Subsection (b) of this section, property taxes are the personal obligation of the person who owns or acquires the property on January 1 of the year for which the tax is imposed. A person is not relieved of the obligation because he no longer owns the property.

(b) The person in whose name a property is required to be listed by Section 25.13 or 25.15 of this code is personally liable for the taxes imposed on the property.

(NOTE: Sec. 25.15 has been repealed)

Section 41.44 of the Tax Code provides in relevant part:

Notice of Protest. (a) Except as provided by Subsections (b) and (c), to be entitled to a hearing and determination of a protest, the property owner initiating the protest must file a written notice of the protest with the appraisal review board having authority to hear the matter protested:

(1) before June 1 or not later than the 30th day after the date that notice was delivered to the property owner as provided by Section 25.19, whichever is later;

Section 41.46 of the Tax Code provides in relevant part:

Notice of Protest Hearing. (a) The appraisal review board before which a protest hearing is sched-

uled shall deliver written notice to the property owner initiating a protest of the date, time, and place fixed for the hearing on the protest. The board shall deliver the notice not later than the 15th day before the date of the hearing.

Section 41.411 of the Tax Code provides in relevant part:

> *Protest of Failure to Give Notice.* (a) A property owner is entitled to protest before the appraisal review board the failure of the chief appraiser or the appraisal review board to provide or deliver any notice to which the property owner is entitled.

Section 42.06 of the Tax Code in effect at the time provided:

> *Notice of Appeal.* (a) To exercise his right of appeal, a party must file written notice of appeal within 15 days after the date he receives the notice required by Section 41.47 or, in the case of a taxing unit, by Section 41.07 of this code that the order appealed has been issued.

Section 42.21 of the Tax Code provides in relevant part:

> *Petition For Review.* (a) A party who appeals as provided by this chapter must file a petition for review with the district court within 45 days after the party received notice that a final order has been entered from which an appeal may be had. Failure to timely file a petition bars any appeal under this chapter.

Article 8, Section 15 of the Texas Constitution provides:

> *Lien of Assessment; Seizure and Sale of Property.*
>
> The annual assessment made upon landed property shall be a special lien thereon; and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the

> payment of all the taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide.

Section 6-1.1-4-22 of the Indiana Code provides in relevant part:

> *Notice of Assessment or Reassessment Amounts to Taxpayer.* (a) If any assessing official or any board assesses or reassesses any real property under the provisions of this article, the official or board shall give notice to the taxpayer, by mail, of the amount of the assessment or reassessment.

STATEMENT OF THE CASE

BELLAIRE's statement of the case is convoluted, misleading, incomplete and inaccurate. Although the opinion below accurately sets forth the statement of facts in this case, to clarify and provide the Court with a complete picture of the case, HUFFMAN adds the following facts. The following facts are also necessary for purposes of completion and accuracy.

1. Overview of The Texas Taxation System

On January 1, of each year, a tax lien attaches to property to secure the payment of taxes. Tax Code § 32.01. All property (real and tangible personal property) in the State of Texas is taxable unless exempt by law. Tax Code § 11.01(a).

The duty of appraising property for ad valorem tax purposes rests with the Central Appraisal District ("CAD") of each county. Tax Code § 6.01. The CAD appraises the property at its market value as of January 1.

Tax Code § 23.01. By May 15th of each tax year, or as soon thereafter as practical, the Chief Appraiser of the CAD is required, under certain circumstances, to deliver written notice of the property's appraised value to the property owner.[4] Tax Code § 25.19.

Depending upon the usage of the land and other items, there are a variety of procedural steps a property owner can take to reduce the proposed value of his property as established by the CAD. For instance, the property owner has the right to "render" or establish the value of his own property. Tax Code § 22.01. If a property owner believes his property qualifies for a partial or total exemption from taxation, he may file an application requesting the exemption (i.e. religious exemption). Tax Code, Chapter 11. If a property owner believes his property qualifies for a special land use designation (i.e. agricultural or timber land), he may apply for such designation each year and, if granted, receive a reduced property valuation. Tax Code §§ 23.43(a), 23.73. Since taxes are assessed based upon the property's appraised value, a reduction in value, whether by exemption or special land use designation, necessarily reduces the amount of taxes due.

If the property owner disagrees with the appraised value of the property, the denial of an exemption or denial of a special use designation, he can protest to an Appraisal Review Board. Tax Code §§ 41.41, 41.44, & 42.06. If,

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4. While "property owner" is not defined in the Tax Code, it has been judicially defined as a proprietor or possessor of legal title in property. *Bennett-Barnes Invest. Co. v. Brown County Appraisal Dist.*, 696 S.W.2d 209 (Tex. App.—Eastland 1985, writ ref'd n.r.e.). This definition was reaffirmed by the opinion below. *See First Nat'l Bank v. Huffman Ind. School Dist.*, 770 S.W.2d 571, 573 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

after appearing before the Appraisal Review Board, the property owner is still dissatisfied, he can file suit in the District Court in the county where the Appraisal Review Board is located. Tax Code § 42.21.

Although these procedures apply to a "property owner", the Tax Code permits the property owner to appoint a fiduciary or designated representative, such as a lienholder, to receive all notification, to file for the applicable exemption and/or special usage designation and to pursue all administrative remedies. Tax Code §§ 1.07, 1.11. Thus, BELLAIRE's claim that lienholders are excluded "as a matter of law" from this process is patently wrong and misleading. *See* petition at page 8.

Texas Courts have held that the notice provisions, the methods to contest valuations and taxes, and the procedures for judicial review contained in the Tax Code provide complete due process protection to a property owner. *Brooks v. Bacchus,* 661 S.W.2d 288, 290 (Tex. App.—Eastland 1983, writ ref'd n.r.e.). Since the Tax Code allows a lienholder, with the property owner's permission, to "step into the shoes" of the property owner vis-a-vis all notice and protest procedures, a lienholder is afforded complete due process protection.

2. Priority of a Tax Lien

On January 1 of each year, a tax lien attaches to property to secure the payment of taxes. Tax Code § 32.01. It is a priority lien, not a "super-priority" lien as coined by BELLAIRE, which takes precedent over all other liens in existence, save and except, where applicable, federal tax liens. Tax Code §§ 32.01, 32.04, 32.05 and Tex. Const., Art. 8, § 15 (Vernon 1955). The existence and priority position of a tax lien does not

adversely affect a lienholder's interest in property: it merely prioritizes the liens, thereby ensuring that the tax is paid to the respective taxing authority without fear of the tax lien being eliminated by a lienholder who may precipitously foreclose on the property.

BELLAIRE claims that because a tax lien is a priority lien, any increase in tax liability correspondingly diminishes the value of its interest in the property. *See* petition at page 6. BELLAIRE's contention is without merit.[5] BELLAIRE's attempt to correlate the priority of a tax lien to a decrease in property value is nonsensical. *See* petition at page 17.

3. The Present Case

This case involves the collection of ad valorem taxes. HUFFMAN filed suit against I. T. May, Jr., Trustee ("MAY") for the collection of delinquent ad valorem taxes on several tracts of real property located in Huffman, Harris County, Texas. Subsequently, HUFFMAN learned BELLAIRE had foreclosed upon a portion of the land previously owned by MAY (379.74 acres), and BELLAIRE was thereafter made a party to the suit.

The only taxes involved in this case are for tax year 1985, when MAY was owner and BELLAIRE was lienholder. In 1984, MAY applied for and received an agricultural use designation pursuant to § 23.43 of the Tax Code. This designation reduced the appraised value of

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5. Assume a parcel of property is valued at $100,000 and taxes are assessed at $1.00 per $100 of value. Assume a lienholder has a $90,000 lien on the property. Taxes due are $1,000. Next, assume the property value increases to $150,000. Taxes at $1.00 per $100 of value equal $1,500. Lienholder's $90,000 lien has not "of course" been diminished. Rather, the lienholder is even more secure since the property value has increased.

the property for tax year 1984 and thus, the amount of taxes due was significantly reduced. In 1985, MAY failed to apply for the agricultural use designation; without this credit, MAY's 1985 taxes increased. MAY failed to pay those taxes and this suit was instituted.

BELLAIRE's claim that it did not receive notice when "Respondent taxing units increased the appraised value of real property upon which BELLAIRE had a prior deed of trust lien", is belied by the true facts of this case. First, HUFFMAN has nothing to do with increasing the appraised value of property. As explained above, that is *solely* the function of the CAD, which is not a party to this case.

More importantly, however, there is no evidence that the appraised value of the property was ever increased by the CAD. In fact, the appraised value of the property in question did not change from tax year 1984 to 1985. As the evidence demonstrates, and BELLAIRE admits, MAY's taxes increased solely because MAY failed to apply for an agricultural use designation—not because the appraised value increased in tax year 1985. Thus, the central facts upon which BELLAIRE's petition is predicated (HUFFMAN's failure to give BELLAIRE notice of an increase in the appraised value of the property in question) are false and bear no relation to the true facts of this case.

REASONS FOR DENYING THE WRIT

A. This is not a case of substantial nationwide importance.

Neither the decision below nor the record raises the issue presented by the petition. As explained above and

contrary to BELLAIRE's assertions (petition at 1-2), HUFFMAN did not increase the appraised value of the property in question. Pursuant to the Tax Code, only the CAD has the authority to appraise property. *See* Tax Code § 6.01. Further, the only evidence before the Court demonstrates that the tax liability was increased because MAY failed to file for an agricultural use designation—not because of any new appraisal by the CAD. In fact, the appraised value of the property did not change during the operative time period. Since the case below turns on its own facts and since the "facts" as represented by BELLAIRE are not accurate, this case cannot have nationwide significance.

Even if the facts were as BELLAIRE represents, which they are not, this case still does not present any issue of national import. HUFFMAN does not deny that, absent a request by the property owner, the Tax Code does not mandate that a "lienholder" receive notice of, or be afforded an opportunity to be heard during the assessment and valuation stage. However, Texas law is not an anamoly—nor is it unconstitutional.

The other states' statutes cited by BELLAIRE are, in large measure, inapposite to the crux of BELLAIRE's case: whether a lienholder is denied due process if he does not receive "notice" that the CAD reappraised his mortgagor's property. The statutes cited identify who has standing to contest the property's value—not who is entitled to receive notice of the appraised value. *See* petition at pages 13, 14 and 15.

Should BELLAIRE thus attempt to shift this case's focus from the question of "notice" *solely* to the question of "standing", although different "nouns" are utilized,

Texas law is again consistent with the laws of her sister states.

In Texas, a "property owner" is entitled to notice of and an opportunity to be heard during the valuation and assessment stages of the appraisal process. However, the property owner is not the only individual with "standing" in this regard. BELLAIRE fails to tell the Court that a lienholder, in fact, *any person* (whether they have an interest in the property or not) is entitled to receive notice of and an opportunity to be heard during the valuation and assessment stages of the appraisal process, provided that person has the permission of the property owner.[6] *See* Tax Code § 1.11. *See, e.g., MCI Communications v. Tarrant County,* 723 S.W.2d 350, 351 (Tex. App.—Fort Worth 1987, no writ) (the owner's representative represented the owner at the appraisal protest hearing); *First Union Real Estate v. Taylor County,* 758 S.W.2d 380 (Tex. App.—Eastland 1988, writ denied) (owner appointed fiduciary to "handle all matters relative to assessments"). Thus, with proper notice to the taxing authorities, a lienholder, such as BELLAIRE, can represent the owner for the mutual benefit of both. The statutes cited by BELLAIRE are consistent with Texas law.

B. The Tax Code Does Not Deny a Lienholder Due Process.

BELLAIRE seeks to void the tax lien against the subject property by claiming that it was denied due process since BELLAIRE, as lienholder, was not notified

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6. Since taxes are only the personal obligation of the property owner, it is not unreasonable to require that before a "stranger" to the transaction receives notice of the property owner's personal debt, the property owner must agree to the dissemination of such information.

of the property's appraised value, the property owner's failure to file an agricultural exemption and the amount and status of taxes due.[7] BELLAIRE pleads deprivation of some "substantial property right" since it was not notified of the fact and amount of taxes until after they became "final".

BELLAIRE does not contest that due process was afforded to MAY, the property owner, who was given full notice and opportunity to be heard to contest value, assessment and tax status, as well as full opportunity to file for an agricultural use designation. Nor does BELLAIRE contest that due process was afforded to it, as lienholder, and subsequently as owner, when it was made a party to the tax suit, thereby giving it notice of and an opportunity to be heard prior to the entry of any judgment which would adversely affect BELLAIRE's property rights.

Instead, under the guise of "due process" BELLAIRE is effectively requesting this Court to rewrite the Tax Code to mandate notice of and opportunity to contest the appraisal, assessment and exempt or non-exempt status of a property owner's property be afforded to *every* lienholder, *in addition to* the property owner, and without the owner's permission. BELLAIRE's request clearly exceeds the bounds of due process, common sense and "justice for all", and accordingly, must be denied.

The constitutionality of the Texas Property Tax Code has been upheld by the Texas Courts. *See Brooks, supra.* The notice provisions contained therein, the method to

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7. Even though BELLAIRE makes these assertions, it has voluntarily paid the taxes due HUFFMAN. Thus, any questions about the taxes validity are moot.

contest valuations and taxes, and the procedures for judicial review, afford complete due process protection to a property owner. *See Brooks, supra.* This is because in matters of taxation, due process is satisfied if the *party assessed* is given an opportunity to be heard before some assessment board at some stage of the proceedings. *Texas Pipeline Co. v. Anderson,* 106 S.W.2d 758, 762 (Tex. Civ. App.—Austin 1937, writ ref'd). Since a property owner, that is the "party assessed", has a plethora of remedies available to contest value, due process is satisfied.

Since a lienholder, unlike an owner, is not the "party assessed" and is not personally liable for property taxes on property belonging to its mortgagor, a lienholder need not be afforded the same rights as a property owner. However, because any lienholder can be designated as the property owner's "agent" or "fiduciary", a lienholder accedes to the rights of the owner, free of corresponding liability. Thus, the Tax Code provides due process protection to a lienholder, like BELLAIRE.

The rationale for mandating that notice be given to a "property owner" is sound: a lienholder does not have the same liability as the "owner", it is not the "party assessed". The Tax Code provides that "property taxes are the personal obligation of the person who owns or acquires the property on January 1 of the year for which the tax is imposed." Tax Code § 32.07. Persons or entities having legal title to the property are considered "owners" for purposes of taxation. *See Childress County v. State,* 95 S.W.2d 1031 (Tex. 1936). Only "owners" are personally liable for the payment of ad valorem taxes. Tax Code § 32.07. Lienholders, who do not own the property until *after* foreclosure, and those persons with similar contingent interests in property, cannot be compelled by the taxing districts to individually pay ad

valorem taxes. *See, e.g., State v. Lincoln Corp.*, 596 S.W. 2d 593 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.) (pre-Code case holding that secured creditor who does not own property does not personally owe taxes on the property). Nor can a personal judgment be taken against the lienholder. *See* Tax Code § 32.07. *See also City of San Antonio v. Toeperwein,* 133 S.W. 416 (Tex. 1911). Since only property owners, not lienholders, are required to *pay* taxes, due process requires only "property owners" or their fiduciaries be given notice of assessment and an opportunity to contest same. The Tax Code clearly does this. *See* Tax Code §§ 1.07; 23.43(a); 25.19; 41.11; 41.411; 41.46. *See also Bennett-Barnes Investments, supra.*

If taxes remain delinquent, and collection methods pursued, lienholders are regularly and uniformly made parties to any such proceeding. *See Coakley v. Reising,* 436 S.W.2d 315 (Tex. 1968), *appeal after remand,* 457 S.W.2d 431 (writ ref'd n.r.e.). This is because a tax lien is superior to any other lien and after a tax sale, any interest held by the mortgagee might be eliminated. Tax Code § 32.05(b). Thus, a lienholder must be made a party to such a proceeding because, upon sale, a "substantial property right" of the lienholder is affected. *See also* Rule 39 of the Texas Rules of Civil Procedure. The mere assessment and imposition of taxes which occurs with regularity and predictability, has no adverse impact upon a lienholder individually, or upon his ability to exercise his rights by virtue of his lien.

Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) ("Mennonite"), does not address the right of a lienholder to receive notice of and an opportunity to contest the appraised value, the taxes assessed and/or

the existence of an agricultural use designation attaching to its mortgagor's property. Instead, *Mennonite* involves a *tax sale*: an actual and real deprivation of a mortgagee's valuable property rights. By providing notice to a lienholder prior to foreclosure (tax sale), the Tax Code complies with both the letter and spirit of *Mennonite,* and no due process deprivation occurs.

C. The Texas Court of Appeals Properly Construed *Mennonite.*

HUFFMAN adopts the opinion of the Fourteenth Court of Appeals and its application of *Mennonite* to this case. Further, HUFFMAN rejects BELLAIRE's claim that the tax sale condemned in *Mennonite* is identical to the administrative appraisal and assessment process in Texas. Nothing could be further from the truth.

Like Texas, Indiana provides for notice of appraisal and assessment be sent to the "taxpayer", not the "lienholder". Ind. Code § 6-1.1-4-22 (1989). The *Mennonite* case did not attack this Indiana statute dealing with notice of appraisal and assessment—it only addressed the statute involving notice of a tax sale, a sale of the property to pay unpaid taxes previously assessed. BELLAIRE's attempt to correlate the "tax sale notice" in *Mennonite* to the "assessment and valuation notice" in Texas "emasculates" this Court's ruling and distorts the Fourteenth Amendment.

HUFFMAN agrees that BELLAIRE has a legally protected property interest and is entitled to notice prior to a tax sale. Such notice was afforded to BELLAIRE. Such notice is all *Mennonite* requires.

As a lienholder, BELLAIRE is in privity of contract with the mortgagor, or property owner. The relationship is typically defined and circumscribed by the promises, warranties and covenants contained in the promissory note, deed of trust and similar loan documents. One typical provision in these documents requires the mortgagor to provide the bank or lienholder with proof that taxes are paid. Failure to do so can result in a "default" allowing the lienholder to foreclose on the property or exercise its other remedies.

If BELLAIRE wishes to participate in the appraisal and assessment stages, contest value or receive notice of appraisals and the like, BELLAIRE merely needs to insert a provision in its form documents and/or have its borrower execute a form letter, addressed to the CAD, requesting notice be sent to BELLAIRE. For the price of a stamp, BELLAIRE can obtain more information than it could possibly want and can participate in virtually every phase of the taxing process.

It should be noted that the majority of taxpayers pay their taxes prior to delinquency: only a minute fraction of taxpayers ever fall delinquent. Once the taxes are delinquent, if suit is instituted, the lienholder is then notified prior to any tax sale. To mandate that the CAD *locate* every lienholder and send notice of appraisal, assessment and exempt or non-exempt status to them *in adaition to* every property owner, even before values are contested or payment of taxes is at issue, exceeds the bounds of due process. Such a mandate would cause a tremendous increase in the cost of disseminating

tax information. This in turn, would pass an already spiraling tax burden onto the shoulders of the majority of the taxpayers, who timely pay their taxes. To adopt BELLAIRE's procedure would only serve to overburden the taxing authorities and do little to afford lienholders any further due process protections. Further, if such information is disseminated without the property owner's permission such disclosure could impinge upon the property owner's right to privacy.

Justice O'Conner recognized the fallacy of BELLAIRE's argument in *Mennonite* when she wrote:

> When a party is unreasonable in failing to protect its interest, despite its ability to do so, due process does not require that the State save the party from its own lack of care.

Mennonite, supra at 809 (dissenting opinion). Since BELLAIRE has the ability to monitor taxes and ensure payment, obtain information directly from its mortgagor or from the taxing authorities (via proper authorization), and participate in the contest of such valuations (via proper authorization), this Court should not declare the Tax Code unconstitutional to save BELLAIRE from the consequences of its own lack of diligence and care.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL J. DARLOW
PRAPPAS, DARLOW &
CHILDERS, P.C.
3120 Southwest Freeway #412
Houston, Texas 77098
713/526-3439

Counsel of Record for Respondent,
Huffman Independent
School District

APPENDIX A

HUFFMAN I.S.D. TAX OFFICE
24403 E. LAKE HOUSTON PARKWAY
HUFFMAN, TEXAS 77336
PHONE: (713) 324-1871

ADMINISTRATOR OF TAXES
HERBERT REEVES, CTA, RPA

AUDIT COPY DELINQUENT TAXES

ACCOUNT NO	PROPERTY DESCRIPTION
62-002-0002	TR 2B PT TRS 1 & 1D ACG 4510 AG ASSESSED 10-1 ABST 62 JOHN R RHEA 379.74 AC

RECEIPT NO 600825

1985

THIS IS TO CERTIFY THAT A REDEMPTION RECEIPT HAS BEEN ISSUED FOR THE TOTAL DELINQUENT TAXES DUE ON THE PROPERTY HEREIN DESCRIBED FOR THE YEAR

FIRST NAT'L BANK BELLAIRE
COLES WARREN G, JR.
P.O. BOX 40
BELLAIRE, TX. 77401

HUFFMAN ISD 01		15816.29
Vouc. # 86-322	90	
	CC	128.00
	RM	75.00
	TS	37.50

TAX	15816.29
P & I	7429.80
ATTY. FEE	3775.88
MISC. COST	240.50
TOTAL	27342.47

IF PAID IN	P & I DUE	IF PAID IN	P & I DUE	IF PAID IN	P & I DUE
SEP89	12558.13	MAR90	13649.46	SEP90	14740.79
OCT89	12740.03	APR90	13831.34		
NOV89	12921.91	MAY90	14013.24		
DEC89	13103.80	JUN90	14195.12		
JAN90	13285.68	JUL90	14377.01		
FEB90	13467.57	AUG90	14558.89		

ATTORNEY FEES CHARGED

☐ MONEY ORDER
☐ CHECK
☐ CASH

0388750113S 31670HUSU $29342.47CK

DATE ______ RECEIVED BY ______